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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-257

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,
Petitioner,

vs.

GENERAL ELECTRIC CREDIT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported in 447 F.2d 286. It is contained in Petitioner's printed Petition for Writ of Certiorari, at page A1, Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1). The judgment of the Court of Appeals was rendered on June 2, 1971. Petition for Writ of Certiorari was filed August 20, 1971, and granted December 7, 1971.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves Art. 3, Sec. 2, Cl. 1 of the U. S. Constitution; 28 U.S.C. 2410; 28 U.S.C. 1444; 28 U.S.C. 1441; 28 U.S.C. 1331; 28 U.S.C. 1332; 15 U.S.C. 1; 15 U.S.C. 15; and incidentally, 28 U.S.C. 1337 and 28 U.S.C. 1345. These are contained in the Appendix A, infra.

QUESTIONS PRESENTED

I. Where this case was removed from State Court to the U.S. Court by the U.S. Government (which was a defendant lienholder in State Court and became a cross plaintiff in the U.S. Court) and all parties consented to trial in the U.S. Court which proceeded to judgment on the merits in favor of Petitioner, should the case be remanded now, if it appears that the statute on which removal was based was not applicable, even though there was diversity, the suit involved the U.S. anti-trust statutes, and involved the U.S. Government and its property rights?

II. Assuming the U.S. Government improperly removed the case, should the judgment on the merits in the U.S. Court fall and the case be remanded for retrial in the State Court, even though the suit (1) involves the U.S. anti-trust statutes, (2) involves a claim of tortious interference with the government's lien, (3) there is complete diversity, and (4) all parties consented to trial on the merits in the U.S. Court?

III. Does the U.S. Court have removal jurisdiction in a case where the United States is a defendant even though the United States does not bring itself within the provisions of a specific statute authorizing removal?

IV. Was this case removable under 28 U.S.C. 2410 and 1444, since the United States was made a party under that statute, and the controversy actually involved the validity, applicability and protection of the government's lien?

SUMMARY STATEMENT OF THE CASE

This suit was for debt brought in State Court by General Electric Credit Corporation against T. R. Grubbs. (Page 7 Appendix) Grubbs cross actioned against General Electric Credit Corporation (Page 14 Appendix) and brought in General Electric Company asking damages under the federal and state anti-trust statutes, because of the destruction of his business by G.E.C.C. and G.E. in conspiracy. Grubbs then brought in the U.S. Government (page 14 Appendix) as a defendant in order to determine the priority of the liens being claimed against him by the government and other parties. The U.S. Government removed the case to the U.S. Court (page 27 Appendix), and then the U.S. Government cross actioned against G.E.C.C. and G.E. (page 32 Appendix) claiming tortious interference by them with its judgment lien against Grubbs, and acts prohibited by the U.S. anti-trust statutes. No party objected to removal. All parties pleaded in federal court, consented to the court's jurisdiction, and requested the court to proceed to trial on the merits. The trial resulted in Grubbs' recovery of $20,000.00 damages against G.E.C.C. for destruction of his business. (Court's opinion, Findings of Fact and Conclusions of Law and Judgment, pages 76-89 Appendix) G.E. was absolved. The U.S. Government was denied relief. The record showed that there was diversity (G.E.C.C. and G.E. being New York corporations and Grubbs being a citizen of Texas), that the federal anti-trust statutes were involved, and that

the U.S. Government was a defendant and cross plaintiff in the case.

The Court of Appeals raised the question of improper removal sua sponte. No party complained of it or urged it on appeal. The Court of Appeals required supplemental briefs on the subject of jurisdiction, specifically asking argument on whether the removal was proper, and if not, could the case have been removed for other than the stated reason. Briefs were filed and Petitioner pointed out in his brief the several different grounds of jurisdiction in the U.S. Court other than the government's stated grounds for removal, which were 28 U.S.C. 2410 and 1444. The Court of Appeals held that 28 U.S.C. 2410 and 1444 did not apply and remanded the case to the State Court. The Court of Appeals stated in its opinion that there was "no allegation of diversity or federal question", *although Petitioner repeatedly called their existence to the Court's attention* in his brief and petition for rehearing. The petition for rehearing was denied.

SUMMARY OF ARGUMENT

I.

As the United States District Court which tried this case had cognizance of the subject matter and the parties, it was error for the Court of Appeals to remand the case to State Court even if removal was improper or unauthorized, since all parties consented to jurisdiction and trial on the merits by the U.S. Court and appealed to that court for relief and the determination of the entire controversy. *Baggs* v. *Martin*, S.Ct., 179 U.S. 206, 21 S.Ct. 109, 45 L.Ed. 155; *John C. McKay* v. *Uinta Development Company*, S.Ct., 229 U.S. 173, 57 L.Ed. 1138, and others.

Sustaining the U.S. Court's jurisdiction not only is in accord with the decisions of this Court, but conforms to the principles of common sense and basic justice.

II.

The U.S. District Court in this case had jurisdiction to hear the case on the following grounds:

A. Diversity of Citizenship. Petitioner Grubbs was a citizen of Texas and General Electric Credit Corporation and The General Electric Company were both New York corporations. The record sufficiently shows diversity (*Sun Printing Co.* v. *Edwards*, S.Ct., 194 U.S. 377, 48 L.Ed. 1027 and others), and Respondent concedes it (Page 5 Brief in Opposition to Writ).

B. United States anti-trust laws. Petitioner brought his action for damages under the U.S. anti-trust laws, 15 U.S.C. 1, 15 U.S.C. 15, and the United States, after it removed the case sought affirmative relief against General Electric Credit Corporation and General Electric Company by reason of actions prohibited by the United States anti-trust laws. *Parker* v. *Brown*, S.Ct., 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315; *Hart* v. *B. F. Keith Vaudeville Exchange*, S.Ct., 262 U.S. 271, 43 S.Ct. 540, 67 L.Ed. 977.

C. The presence of the United States as a party. The United States was sued as a defendant in State Court. By virtue of the United States Constitution Art. 3, Sec. 2, the U.S. Court had jurisdiction of the case. *Minnesota* v. *Hitchcock*, S.Ct., 185 U.S. 373, 46 L.Ed. 954. In addition, the United States filed a cross action seeking affirmative relief against G.E.C.C. and G.E. Therefore, the U.S. was a "plaintiff" within the meaning of 28 U.S.C. 1345 which provides that the U.S. Courts have jurisdiction of actions where the United States is a plaintiff.

D. The involvement of a property right of the United States. The United States was brought into the suit because of a judgment lien which it claimed was prior and superior to rights being claimed by others. Since a property right of the United States was in dispute, a federal question sufficient to give jurisdiction was present.

III.

As the U.S. Court had jurisdiction of this cause on the various grounds discussed herein, it had pendent jurisdiction to determine the entire controversy, even though it found against some of the federal issues or declined to pass upon them in its decision on the merits. *Township of Hillsborough* v. *Cromwell,* S.Ct., 326 U.S. 620, 90 L.Ed. 358, 66 S.Ct. 445, and others.

IV.

The mere presence of the United States as a party to this suit in State Court authorized the removal to the U.S. Court.

A. Federal courts have original jurisdiction of controversies to which the United States is a party. U. S. Constitution, Art. 3, Sec. 2. 28 U.S.C. 1441 provides that any suit brought in State Court of which the U.S. Courts have original jurisdiction, may be removed by the defendant. This applies to the case at bar, since the United States was a party defendant in State Court. Any case in State Court in which the interests, the property, the rights or the authority of the federal government may come into question, may be removed to the U.S. Court. *U. S.* v. *Lee,* S.Ct., 106 U.S. 196, 27 L.Ed. 171.

B. The presence of the federal government as a party necessarily involves a federal question, since the rights,

titles, privileges and authority of the U.S. Government are all created by, depend upon, and are regulated by, U.S. laws. Dissenting Opinion, *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, S.Ct., 337 U.S. 582, 93 L.Ed. 1556.

V.

This case was properly removed by the United States under 28 U.S.C. 2410 and 1444.

A. Sec. 1444 of 28 U.S.C. provides that any action "brought" under Sec. 2410 may be removed by the United States. This action was brought under Sec. 2410. The Court of Appeals ruling that Petitioner did not sustain his action under 2410 and therefore the U.S. Court did not have jurisdiction, confuses "jurisdiction" with "decision on the merits". The action under 2410 conferred removal jurisdiction, whether sustained on the merits or not. *Hart* v. *B. F. Keith Vaudeville Exchange*, S.Ct., 262 U.S. 271, 43 S.Ct. 540, 67 L.Ed. 977. The basis for federal jurisdiction is determined from the allegations of the complaint, not the determination on the merits. *Pacific Electric Ry. Co.* v. *Los Angeles*, 194 U.S. 112, 48 L.Ed. 896.

B. In addition, the U.S. court had jurisdiction under 28 U.S.C. 2410 and 1444 because the consent to sue the United States granted by 2410 is conditioned on the absolute removal privilege granted by 1444, and to hold that the federal court has jurisdiction only if the claim under 2410 is well founded, is to force the United States to a determination on the merits by the State Court. At any rate, since the United States removed the case, and then sought affirmative relief in the U.S. court, jurisdiction became conclusively established. *Hood* v. *U. S.*, (CCA 9th) 256 F.2d 522.

C. Removal by the United States under 28 U.S.C. 2410 and 1444 was proper, since the real substance of the claim against the United States was within the purview of 2410 since there was involved the disputed priority of the government's lien, and the ownership and preservation of property on which the government claimed a lien.

ARGUMENT

I.

As the U.S. District Court in the case at bar had the organic power to hear the controversy, it was error to remand the case to State court even if removal was improper, since all parties consented to trial on the merits by the U.S. court and appealed to that court for relief and the determination of the entire controversy. *Baggs* v. *Martin*, S.Ct., 179 U.S. 206, 21 S.Ct. 109, 45 L.Ed. 155; *John C. McKay* v. *Uinta Development Co.*, S.Ct., 57 L.Ed. 1138, 229 U.S. 173; *In re Albert Moore*, S.Ct., 209 U.S. 490, 28 S.Ct. 585, 52 L.Ed. 904; *Kreigh* v. *Westinghouse, Church, Kerr & Co.*, S.Ct., 214 U.S. 249, 29 S.Ct. 619, 53 L.Ed. 984; *French* v. *Stewart*, S.Ct., 89 U.S. 231, 22 Wall. 238, 22 L.Ed. 584; *Pacific Ry. Co.* v. *Ketchum*, S.Ct., 101 U.S. 289, 25 L.Ed. 932; *Trayler* v. *Black, Sivalls & Bryson*, (CCA 8th) 189 F.2d 213; *Handley Mack Co.* v. *Godchaux Sugar Co.*, (CCA 6th) 2 F.2d 435; *Toledo St. Louis and Western Ry. Co.* v. *Perenchio*, 205 F. 472, cert. den., 231 U.S. 745, 58 L.Ed. 464; *Bailey* v. *Texas Co.*, (CCA 2nd) 47 F.2d 153.

The case of *John C. McKay* v. *Uinta Development Co.*, S.Ct., 229 U.S. 173, 57 L.Ed. 1138 is closest in point with our case as to the facts. The question certified to this Honorable Court in that case by the 8th Circuit Court and this Court's answer clearly illustrate the rule:

"Assuming that the removal at the instance of Mackay was not in conformity with the removal statute, and assuming that, as respects his claim against the Development Company, all the jurisdictional elements were present which were essential to enable the circuit court to take cognizance thereof in that court, and assuming that in such an action the Development Company lawfully could have set up its claims as a counterclaim and thereby have entitled the court to take cognizance thereof, did the parties, by appearing in the circuit court and there litigating both claims to a final conclusion in a single cause, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, enable that court to take cognizance of the controversy and to proceed to a final judgment therein with like effect as if they had invoked the jurisdiction of that court in the first instance through an action commenced therein by Mackay upon his claim, and through the interposition by the Development Company of its claim as a counterclaim in that action?

This question must be answered in the affirmative."

In our case, no question was ever raised by any party as to lack of jurisdiction, but all appealed to the Court for a determination of their claims on the merits.

The extent to which all parties in the case at bar appealed to and recognized the jurisdiction of the U.S. District Court may be noted by looking at the Clerk's docket entries and the instruments shown in the appendix. A similar situation was emphasized by Justice Brewer in this Honorable Court's decision in *In re Moore*, S.Ct., 209 U.S. 490, 52 L.Ed. 904, as he stated:

"That the defendant consented to accept the jurisdiction of the United States court is obvious . . . After the removal the plaintiff, instead of challenging the jurisdiction of the United States Court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer, and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States Court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition was an appeal to that court for a trial upon the facts averred by him, as they might be controverted by the Defendant. And this, as we have seen was followed by repeated recognitions of the jurisdiction of that court."

The Court continued by saying:

". . . the defendant applied for a removal of the case to the Federal Court. Thereby he is foreclosed from objecting to its jurisdiction."

"In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is equally with the defendant, precluded from making objection to its jurisdiction."

Several well reasoned decisions of the Circuit Courts of Appeal have followed and applied the rule approved by this Honorable Court in *McKay* v. *Uinta*, supra, and *In re Moore*, supra, and *Baggs* v. *Martin*, supra. In *Handley Mack Co.* v. *Godchaux Sugar Co.*, CCA 6th, 2 F.2d 435, the Court said:

". . . jurisdiction will be retained where, as here, although the case *was not technically removable* un-

der the statute, the court yet had jurisdiction over the subject-matter of the controversy, and the parties had fully consented to the federal jurisdiction and acted thereunder."

Judge Baker's comment in *Toledo, St. Louis & Western Ry. Co.* v. *Perenchio*, 205 F. 472, cert. denied, 231 U.S. 745, 58 L.Ed. 464, seems to sum up the decisions as approved by this Honorable Court:

". . . within its limitations respecting subject matter, a federal court is a court of general jurisdiction. If organic power to hear the controversy exists, *it is immaterial when or how the parties get into court*; it is enough if they do come in and waive all the preliminaries to the submission of the controversy.

American Fire and Casualty Co. v. *Finn*, S.Ct., 341 U.S. 6, 95 L.Ed. 702, is clearly distinguishable since there this Court found that in that case the U.S. Court could not have had jurisdiction even in the posture it had at the time of judgment. In our case, the U.S. Court had original jurisdiction of the case both at removal and throughout the proceedings.

Not only is the rule above stated approved by the cases, but it is supported by logic and common sense and it conforms to the principles of basic fairness and justice. Remand in this case would allow what the Court of Appeals said was an erroneous assumption by the government, which recovered nothing and suffered no liability, to undo a long and thorough trial on the merits to which all parties consented, and to destroy a well deserved recovery of damages by Petitioner Grubbs. Such a result would be neither fair nor logical. Parties cannot create jurisdiction by consent, but if the Court has cognizance of the subject matter or the parties, the parties can waive

all other jurisdictional prerequisites. As stated by this Honorable Court in *Pacific Ry. Co.* v. *Ketchum,* S.Ct., 101 U.S. 289, 25 L.Ed. 932.

> "Consent cannot give the Courts of the U.S. jurisdiction, but it may bind the parties and waive previous errors, *if when the Court acts,* jurisdiction has been obtained."

In our case, even if removal was, as said in *Lopata* v. *Handler,* (CCA 10th) 121 F.2d 939, "wholly unauthorized" yet the U.S. Court had organic power to hear the controversy on several grounds, and it clearly had jurisdiction when it acted. In a thorough trial, after one year and eight months in the U.S. Court, with all parties consenting to the jurisdiction, the claims of all parties were adjudicated on the merits. Now, if remand is ordered, all this will be taken away—Grubbs will lose his recovery which was the culmination of years of work and great expense; the General Electric Co. which was exonerated, now will be subjected to another trial, possibly resulting in liability; and G.E.C.C. will be put to another long and expensive trial without having an adjudication of its appellate points.

Such a result would cause the innocent to suffer. If the Government improperly removed the case, then it, and not the rest of us, should suffer the consequences. Surely at this late date, all the effort, time and expense which have gone into this case should not go down the drain just because an error may have been made in the Government's removal and the rest of us were not so adverse to being in the U.S. Court that we failed to object to the removal.

To remand this case now would go against our traditional concept of a litigant's "day in court". It is generally true that when litigants fail to object, they are

bound by what is done with their consent. Here, if remand is ordered, the opposite will be true. Parties will be allowed to stand by in silence, and now that the trial has gone against them, have another go at it in another forum. The undesirable consequences of such a situation were emphasized by this Honorable Court in *In re Moore*, supra, when it said:

> "We have made these many quotations and references, not simply to establish the doctrine itself, *but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule*; for if . . . an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the *litigation must be had over again in some other court, resulting possibly in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.*"

II.

Respondent concedes in its answer to the Petition for Writ, that the U.S. Court had original jurisdiction of the case at bar. That being true, the case falls squarely within the rule that jurisdiction should be sustained even if removal was improper or unauthorized.

In this case, the U.S. Court had jurisdiction of or the organic power to hear the case on several grounds:

A. Diversity of Citizenship. 28 U.S.C. 1332 provides that the U.S. Courts shall have original jurisdiction of all civil actions between citizens of different states. In the case at bar, Petitioner Grubbs was a citizen of

Texas and G.E. and G.E.C.C. were citizens of New York. Respondent admits the diverse citizenship (Page 5, Brief in Opposition to Petition for Writ). The pleadings, answers to Interrogatories and testimony all confirm it. (See Plaintiff G.E.C.C.'s original Petition, Page 7 Appendix; Answers to Interrogatories, Page 67 Appendix, and transcript of testimony, Appendix below).

Since the record showed diversity, there was no necessity that there be any formal allegation of it. *Sun Printing Company* v. *Edwards*, S.Ct., 24 S.Ct. 696, 194 U.S. 377, 48 L.Ed. 1027; *Gordon* v. *Third National Bank*, S.Ct., 12 S.Ct. 657, 184 U.S. 97, 36 L.Ed. 360. Of course, the jurisdictional amount is clearly established by the monetary and damage claims contained in the pleadings.

The addition of other parties who were judgment creditors of Petitioner Grubbs, after the case was in the U.S. Court, did not operate to defeat jurisdiction on the ground of diversity. They were not real parties to the controversy between Grubbs and G.E.C.C. and G.E., but were similar to interpleaders, and the Court's ancillary jurisdiction would apply to them at any rate. See *Wichita Railroad & Light Co.* v. *Public Utilities Commission of Kansas*, S.Ct., 260 U.S. 48, 67 L.Ed. 124; *Stewart* v. *Dunham*, S.Ct., 5 S.Ct. 1163, 115 U.S. 61, 29 L.Ed. 329.

B. U.S. Anti-Trust Laws. The amended answer and cross action filed by Petitioner Grubbs *before removal*, pleaded a cause of action for damages against G.E.C.C. and G.E. under the United States (15 U.S.C. 1; 15 U.S.C. 15) anti-trust statutes, as well as the Texas Anti-Trust Statutes. (Appendix, Page 10). The cross action filed by the U.S. Government against G.E.C.C. and G.E. after removal, which was its first opportunity to plead affirmatively, pleaded an action under the U.S. Anti-Trust Laws, to the effect that G.E.C.C. and G.E., acting in un-

lawful concert, maliciously and intentionally prohibited Grubbs from carrying on his business and interfered with the performance by Grubbs of his obligation to the U.S. Government. (Appendix, Page 32).

The Courts of the United States are given original jurisdiction of suits arising under the U.S. anti-trust laws. Title 15 U.S.C. 15 provides that any person injured in his business or property by anything forbidden in the anti-trust laws, may resort to the U.S. Courts for relief. In addition, 28 U.S.C. 1337 provides that the U.S. Court have original jurisdiction of actions involving the laws protecting trade and commerce against restraints and monopolies.

The jurisdiction of U.S. Courts in cases seeking relief under the anti-trust laws is too plain to require the citation of authorities, but the cases of *Parker* v. *Brown*, S.Ct. 317 U.S. 341, 63 S.Ct. 307, 87 L.9d. 315; *Hart* v. *B. F. Keith Vaudeville Exchange*, S.Ct., 262 U.S. 271, 67 L.Ed. 977, 43 S.Ct. 540; and *Binderup* v. *Pathe Exchange*, S.Ct., 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308 illustrate the applicability of the rule to cases where some wrongs similar to these asserted in our case were present.

It appears that even if jurisdiction of the U.S. Courts were not specifically given by statute in cases involving the anti-trust laws, such jurisdiction would be proper anyway on the general basis of federal question. This is because cases seeking to recover by reason of activities which are restricted or governed by U.S. law involve a federal question sufficient to give the U.S. Courts cognizance of such cases. See *Great Northern Ry. Co.* v. *Galbreath Cattle Co.*, S.Ct., 70 L.Ed. 854, 271 U.S. 99: *Southern Pacific Ry. Co.* v. *Frank Stewart*, S.Ct., 62 L.Ed. 472, 245 U.S. 562.

C. The presence of the U. S. Government as a Party. The Constitution of the U.S. provides that the judicial

power of the U.S. shall extend to controversies to which the United States shall be a party. (Art. 3, Sec. 2). Even though removal may have been improper, the presence of the U.S. Government as a party gave the U.S. Court cognizance of the case, and jurisdiction was properly retained where all parties consented to it. See *Minnesota* v. *Hitchock*, S.Ct., 185 U.S. 373, 46 L.Ed. 954; *Monaco* v. *Mississippi*, S.Ct., 292 U.S. 313, 78 L.Ed. 1282.

In addition, 28 U.S.C. 1345 provides that the U.S. Courts shall have original jurisdiction of all civil suits commenced by the United States. In the case at bar, the United States sued G.E.C.C. and G.E. for damages for unlawful interference with its contract with Petitioner Grubbs, alleging an unlawful action in concert to prohibit his conducting his business at a profit. (Appendix, Pages 32 & 50). Although this action was labeled a "cross action" it was actually an independent cause of action for affirmative relief, initiated by the U.S. against parties who were not suing the U.S. Therefore, in reality, the United States was the "plaintiff" in that cause of action. It is well settled that the U.S. Courts are not bound by the designation or alignment of parties in State Court, but they will make that determination for themselves based upon the real controversy and the nature of the relief sought. Since the U.S. Government was seeking affirmative relief in a new action instituted initially by it, it seems that it would be in the case as a "plaintiff" within the meaning of 28 U.S.C. 1345. See *Erickson* v. *U.S.*, S.Ct., 264 U.S. 246, 68 L.Ed. 661.

D. The involvement of a property right of the U.S. Government. In our case, the U.S. Government was brought in upon the assertion that it was claiming that its lien against the property of Grubbs was prior and superior to all others. (Appendix, Page 10 et seq.). The

U. S. Government confirmed this as it asserted in its pleadings that it "has a prior and superior claim against any and all assets or property presently in the possession of T. R. Grubbs, or which he might acquire in the future" by virtue of its judgment against Grubbs (Appendix, Pages 32 & 50), and that such judgment lien was "prior and superior to all other claims or liens asserted by other parties to this proceeding." (Appendix, Pages 32 & 50). General Electric Credit Corporation was then a party to the proceeding and there was involved its action in taking possession of various items of property belonging to, or in the possession of Grubbs, asserting the right to sell such property as in foreclosure. As the case involved a property right of the U.S. Government, and the applicability of its lien to certain property, the U.S. Court had cognizance of the case on that basis.

III.

As the U.S. District Court had jurisdiction on the various grounds discussed previously, it had pendent jurisdiction to determine the entire controversy, even though it found against some of the federal issues or declined to pass upon them, in its determination on the merits.

Township of Hillsborough v. *Doris Cromwell*, S.Ct., 326 U.S. 620, 90 L.Ed. 358, 66 S.Ct. 445; *Siler* v. *Louisville and N. R. Co.*, S.Ct., 213 U.S. 175, 29 S.Ct. 458, 53 L.Ed. 753; *Wichita Ry. & Light Company* v. *Public Utilities Commission of Kansas*, S.Ct., 260 U.S. 48, 67 L.Ed. 124

Cases applying the rule as approved by this Honorable Court, but with fact situations closer to ours, are *Southside Theaters* v. *United West Coast Theater Company*, CCA 9th, 178 F.2d 648 and *Knuth* v. *Erie-Crawford Dairy Co-op.*, 395 F.2d 420, which held that where the complaint stated a federal claim based on violation of the anti-trust laws,

pendent jurisdiction could be exercised over claims that the defendants violated state law by fraudulent conversion of plaintiff's money and by tortious interference with plaintiff's business.

IV.

Petitioner submits that the mere presence of the United States as a party in this suit in State Court authorized the removal of the case to the U.S. Court by the United States. If there is doubt on this question, it should be settled by this Honorable Court.

A. The U.S. Courts have original jurisdiction of cases where the U.S. Government is a party. U.S. Constitution, Art. 3, Sec. 2. This is true whether the U.S. is a plaintiff or defendant. *Glidden* v. *Zdanok,* S.Ct., 370 U.S. 530, 8 L.Ed.2d 671, 82 S.Ct. 1459; *Monaco* v. *Mississippi,* S.Ct., 292 U.S. 313, 78 L.Ed. 1282; *Minnesota* v. *Hitchcock,* S.Ct., 185 U.S. 373, 46 L.Ed. 954.

Sec. 1441 of Title 28 U.S.C. provides that ". . . any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant. . . ."

This case was a "civil action brought in a State Court." Because the United States was a party, the U.S. Courts had original jurisdiction. The United States was a "defendant." Therefore, it could have removed the case on those grounds. If it removed for the wrong reason, that was a waivable irregularity.

Sec. (b) of Sec. 1441 would not seem to change this proposition, since its intent was obviously to delineate between diversity and all other removable cases, and a suit against the United States would be "under the Constitu-

tion, treaties or laws of the U.S." in the context of that section.

This construction seems to be reasonable and consistent with the intent of Congress, as well as the courts. A search of the U.S. Statutes indicates that Congress intended that all actions involving the United States or its property, its agencies, its rights or its authority be removable to the U.S. Courts. And, as stated by this Honorable Court in *United States* v. *Lee,* S.Ct., 106 U.S. 196, 27 L.Ed. 171:

> ". . . that *no case can arise in a state court,* where the *interests,* the *property,* the *rights* or the *authority* of the federal government may come in question, *which cannot be removed* into a Court of the United States under existing laws."
>
> "In all cases, therefore, where such questions can arise, they are to be decided, *at the option of the parties representing the U.S.,* in courts which are the creation of the Federal Government."

B. The presence of the United States as a party of itself involves a federal question authorizing removal under 28 U.S.C. 1441, since the rights, titles, privileges and authority of the U.S. Government all depend upon and are created and regulated by U.S. laws. For this obvious reason, cases involving agencies and corporations of the United States are removable. *Pacific Ry. Removal Cases,* S.Ct., 5 S.Ct. 1113, 15 U.S. 1, 29 L.Ed. 319; *Osborne* v. *United States Bank,* S.Ct., 9 Wheat. 738, 6 L.Ed. 204. Is a case involving the U.S. Government any less a federal question?

As stated by Chief Justice Vinson in the dissent joined in by Justice Douglas in *National Mutual Ins. Co.* v. *Tide-*

water Transfer Co., S.Ct., 337 U.S. 582, 93 L.Ed. 1556, comment at page 1594,

> "Since any right of action against the U.S. is completely and wholly dependent upon whether an Act of Congress has authorized the suit . . . a question arising under the laws of the United States, . . . is clearly presented by any claim against the federal government."

V.

This case was properly removed by the U.S. Government under 28 U.S.C. 1444.

A. Sec. 1444 of 28 U.S.C. provides that any action "brought" under 28 U.S.C. 2410 against the United States in any State Court may be removed. It is undisputed that this action was "brought" against the U.S. under Sec. 2410. The Court of Appeals in effect held that Petitioner failed to establish his action under 2410 and that therefore the U.S. Court did not have jurisdiction of it. In this, the Court of Appeals fell into error, confusing *jurisdiction to "hear" a claim*, with *the establishment of that claim on the merits.*

Jurisdiction is the power to hear a claim and determine if it is well founded or not - - -not just the power to hear it *if it is well founded.* As stated by Justice Holmes in *Hart* v. *B. F. Keith Vaudeville Exchange*, S.Ct., 262 U.S. 271, 43 S.Ct. 540, 67 L.Ed. 977,

> "The jurisdiction of the District Court is the only matter to be considered on this appeal. That is determined by the allegations of the bill and usually, if the bill or declaration makes a claim that, if well founded, is within the jurisdiction of the court, it is within that jurisdiction, whether well founded or not."

See also *Binderup* v. *Pathe Exchange*, S.Ct., 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 314, where this Honorable Court through Justice Sutherland said,

> ". . . jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it must decide as to the legal sufficiency of the facts proven. Its decision either way upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it."

And, as stated by this court in *Montana-Dakota Utilities Co.* v. *NW Public Service Commission*, S.Ct., 341 U.S. 246, 95 L.Ed. 912,

> "If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has."

Jurisdiction is the authority to decide the case either way. Per Justice Holmes in *The Fair* v. *Kohler Die & Specialty Co.*, S.Ct., 228 U.S. 22, 57 L.Ed. 716. See also *Erickson* v. *United States*, S.Ct., 264 U.S. 246, 68 L.Ed. 661.

The nature of the claim as justifying federal jurisdiction, is determined from the bill or complaint, not on the facts as they turn out. *Pacific Electric Ry. Co.* v. *Los Angeles*, S.Ct., 194 U.S. 112, 48 L.Ed. 896; *Mosher* v. *City of Phoenix*, S.Ct., 287 U.S. 29, 77 L.Ed. 148.

In our case, there was a substantial claim under 28 U.S.C. 2410. The action against the United States was "brought" under the provisions of that section and the United States confirmed the matter when it pleaded rights and priorities thereunder (Appendix, Page 14, and Pages 32 and 33). Therefore, the case was properly removed to the U.S. Court.

B. In addition, this cause was removable under 28 U.S.C. 1444 because the consent to sue granted by 28 U.S.C. 2410 is expressly conditioned on the absolute removal privilege granted the United States under 1444. To hold otherwise would create an intolerable result, for if a party can sue the United States in a State Court *as expressly allowed in 2410,* but the government cannot remove unless the claim is established as being well founded, the government is forced to submit to a determination of the merits by the State Court.

Both Respondent in its brief on Petition for Writ and the Court of Appeals in its opinion, stated that since the Petitioner's claim under 2410 was not well founded, it should have been "dismissed at the outset." By the State Court? If so, there would have been a determination on the merits of it by the State Court in violation of the government's absolute right of removal. If it is meant the U.S. Court should have dismissed, the answer is that such would have required evidence and consideration—that is, *the exercise of jurisdiction.* To say that a Court had no jurisdiction of our action because that action was later found without merit and was dismissed, is in the words of Justice Jackson, to confuse. ". . . the question whether jurisdiction exists . . . with the question whether the complaint states a cause of action." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission,* S.Ct., 341 U.S. 246, 95 L.Ed. 912.

At any rate, since the U.S. removed the case, and *in the U.S. Court sought affirmative relief* as to the priority of its lien *and cross actioned for damages,* the question of jurisdiction became moot and the jurisdiction of the U.S. Court was conclusively established, as held in *Hood* v. *U.S.,* 256 F.2d 522.

C. Removal was proper under 28 U.S.C. 2410 since the cause involved the priority and applicability of the government's lien as to specific property. Removal jurisdiction under 2410 does not depend on the specific relief sought. Rather it rests on the existence of the traditional controversy in which private parties assert ownership which is superior to or may defeat the claimed lien of the government. It is the substance, rather than the form of the controversy, which brings it within the purview of the statute. See *Adler* v. *Nichols*, CCA 10th, 166 F.2d 674. In our case, the substance of the action was clearly within the intended purview of the statute, since it included the ownership and preservation of property on which the U.S. Government claimed a lien. It also involved the disputed priority of the government's lien.

CONCLUSION

After a long and complete trial on the merits in U.S. Court, with Petitioner Grubbs, General Electric Credit Corporation, The General Electric Company, the United States Government and several intervenors consenting to jurisdiction and actively participating in the trial in the U.S. Court, it would seem neither legally correct nor just, to require that it now all be done over in State Court. Such would go against our traditional policy that there should be an end to litigation and that parties should be bound by their actions. It would also go against the law as clearly expressed by this Honorable Court in many of its decisions. Finally, it would deprive Petitioner of his recovery which was both hard earned and justly obtained.

As said by Justice Holmes in *Hart* v. *B. F. Keith Vaudeville Exchange*, supra:

"The logic of the general rule as to jurisdiction is obvious, and the case should be decided upon its merits unless the want of jurisdiction is entirely clear."

For the reasons set out throughout this brief, Petitioner respectfully prays that the judgment of the Court of Appeals ordering remand of this case be reversed and the jurisdiction of the District Court be sustained.

Respectfully submitted,

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Three copies of this Brief were on this the ..... day of January, A.D., 1972 mailed to Honorable Hubert D. Johnson, for Johnson, McElroy, Cravens and Boone, 1900 Mercantile Dallas Building, Dallas, Texas -75201-, Attorneys for Respondent, by depositing same in the U.S. Post Office, with first class postage paid, and addressed to the above address.

.....
BILL J. CORNELIUS

Section 2. Jurisdiction of Courts

Section 2. [1]The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) *to quiet title to,*

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) *of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.*

. . .

§ 1444. Foreclosure action against United States

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending. June 25, 1948, c. 646, 62 Stat. 938, amended May 24, 1949, c. 139, § 82, 63 Stat. 101.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937.

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended July 25, 1958, Pub.L. 85–554, § 1, 72 Stat. 415.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts

is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88–439, § 1, 78 Stat. 445.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of

which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue therefor in any district court* of the United States in the district in which the defendant resides or is

found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931.

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress June 25, 1948, c. 646, 62 Stat. 933.